

ENTERED ON

MAY 10 2007

DOCKET

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	:
	:
CHARLES RANDALL HAMBLLEN and	: CASE NO. 05-95215-JB
JANET SMITH HAMBLLEN,	:
BROOKSTONE FINE WOOD	: CASE NO. 05-95216-JB
PRODUCTS, INC.,	:
CLOSET & STORAGE SOLUTIONS, LLC,	: CASE NO. 05-95217-JB
	:
	: Jointly Administered Under
Debtors.	: CASE NO. 05-95215-JB
	:
	: CHAPTER 7
	:
S. GREGORY HAYS, Chapter 7 Trustee for	:
Charles Randall Hamblen and Janet Smith	:
Hamblen, Brookstone Fine Wood Products,	:
Inc., and Closet & Storage Solutions, LLC,	:
	:
Plaintiff	:
	:
v.	: ADVERSARY PROCEEDING
	: NO. 06-6394
	:
HAMBLLEN FAMILY IRREVOCABLE	:
TRUST; LONNA HARRIS, individually and as	:
Trustee of the Hamblen Family Irrevocable	:
Trust; SARA ANN JONES SMITH,	:
individually and as Trustee of the Hamblen	:
Family Irrevocable Trust; GRANT K.	:
GIBSON, individually and as Trustee of the	:
Hamblen Family Irrevocable Trust, of	:
NPPH HC, of 230 Woodward Trust, of	:
625 Atwood Trust, and of 12230 Cumming	:
Highway Trust; NPPH HC, JANET SMITH	:
HAMBLLEN, CHARLES RANDALL	:
HAMBLLEN, 12230 CUMMING HIGHWAY	:
TRUST, 230 WOODWARD TRUST, 625	:
ATWOOD TRUST, and HALSTIN	:
COMPANY, LLC,	:
	:
Defendants	:

## ORDER

In this adversary proceeding, a former trustee of a defendant trust opposes plaintiff's motion for a default judgment against defendant Hamblen Family Irrevocable Trust ("HFIT"). Following a hearing on the motion, the Court entered an Order on March 15, 2007, requesting plaintiff and defendant Grant K. Gibson, a former trustee of defendant HFIT, file briefs on issues raised by Mr. Gibson. In particular, the Order requested briefs addressing whether the resignations of the trustees of defendant HFIT were effective if no successor trustee was in place, how a trust can be served in Georgia if all the trustees have attempted to resign, and what service, if any, should be effectuated by plaintiff on the beneficiaries of HFIT. After carefully considering the briefs filed and the arguments advanced at the hearing, the Court concludes that defendant HFIT was served and the Clerk's entry of default will not be set aside.

Defendant HFIT was formed in 1999 by debtors Charles and Janet Hamblen for the benefit of their children. It appears at this time that at least one of the children is still a minor. Plaintiff submitted a trust instrument titled "Hamblen Family Irrevocable Trust" dated September 27, 1999, which named two co-trustees, Lonna Harris, Mr. Hamblen's sister, and Sara Ann Jones Smith, Mrs. Hamblen's mother. (*See* Exhibit A, 1, 17-18 attached to brief filed March 19, 2007, (Docket #57) (hereinafter "Trust Agreement")). Plaintiff also submitted a document dated March 27, 2006 adding two additional co-trustees, Grant K. Gibson and NPPH HC as Corporate Trustee, to serve as trustees with Ms. Harris and Ms. Smith. The document appears to have been signed by Ms. Harris on March 30, 2006, Mr. Gibson on April 18, 2006, and Ms. Smith on April 20, 2006.

On September 13, 2006, plaintiff filed this adversary proceeding against the following defendants:

HFIT;  
Lonna Harris, individually and as trustee of HFIT;  
Sara Smith, individually and as trustee of HFIT;  
Grant K. Gibson, individually and as trustee of HFIT, NPPH HC, 230 Woodward Trust,  
625 Atwood Trust, and 12230 Cumming Highway Trust;  
Janet Smith Hamblen;  
Charles Randall Hamblen;  
12230 Cumming Highway Trust;  
230 Woodward Trust;  
625 Atwood Trust; and  
NPPH HC.

On September 26, 2006, plaintiff added Halstin Company, LLC as a defendant and served the amended complaint and reissued summons. Thus, with respect to defendant HFIT, plaintiff served trustees Harris, Smith, and Gibson, and Mr. Gibson was also served as a trustee of defendant NPPH HC. For a brief period, defendant HFIT had counsel of record in the main bankruptcy case, Evan Altman, and plaintiff also served the complaint on Mr. Altman, as attorney for defendants HFIT and Halstin Company, LLC. However, on September 22, 2006, Mr. Altman filed a motion to withdraw as counsel for HFIT and Halstin Company, LLC; the motion was granted as unopposed on October 6, 2006.

Mr. Gibson argues that defendant HFIT was not properly served, because he contends that all of the co-trustees – Ms. Harris, Ms. Smith, Mr. Gibson, and NPPH HC – resigned before plaintiff served the amended complaint on September 29, 2006. The parties appear to agree that both Ms. Harris and Mr. Gibson resigned as trustees of HFIT on July 21, 2006, and that those resignations were effective prior to the service of the amended complaint in this adversary proceeding. The parties disagree as to whether NPPH HC ever resigned as a trustee of HFIT, and they also disagree whether Mr. Gibson was a trustee of NPPH HC. An evidentiary hearing

on these disputes will be necessary in order to rule on plaintiff's motion for entry of default and for a default judgment against defendant NPPH HC.<sup>1</sup>

The facts with respect to Ms. Smith's attempt to resign as a trustee of HFIT are clearer. Plaintiff attached to his brief a copy of a letter from Ms. Smith, dated September 11, 2006, resigning as a trustee of HFIT. The letter states at the bottom that a copy is being sent via e-mail to Charles and Janet Hamblen, the beneficiaries' parents. Ms. Smith's September 11, 2006 letter states that her resignation is "effective September 11, 2006." However, under the terms of the Trust Agreement and applicable law, Ms. Smith's resignation was not effective on September 11, 2006. The Trust Agreement provides in Art. X.I. that in order for a trustee to resign, he or she must give 30 days' prior written notice to the beneficiaries and any other trustee then serving. Thus, Ms. Smith's written resignation on September 11, 2006, would not take effect until October 12, 2006, at the earliest. Furthermore, Georgia law provides for the resignations of trustees in O.C.G.A. § 53-12-175, and subsection (d) states as follows:

(d) If the resignation would create a vacancy required to be filled, then the resignation shall not be effective until the successor accepts the trust.

If Ms. Smith was the last trustee to resign, then her resignation would create a vacancy. There is no indication here that any successor accepted the position as trustee when Ms. Smith attempted to resign. Thus, her resignation as a trustee of HFIT was not effective as of the date plaintiff served the amended complaint. Accordingly, service was properly effected on defendant HFIT by serving Ms. Smith as a trustee of HFIT on September 29, 2006, and no answer or other responsive pleading has been filed by defendant HFIT within the time allowed

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<sup>1</sup> At a scheduled hearing on plaintiff's motion for entry of default and default judgment against NPPH HC on April 30, 2007, the parties were not prepared to present evidence on the disputed facts.

by law. Pursuant to Fed. R. Civ. P. 55(a) and (b), made applicable to adversary proceedings by Fed. R. Bankr. P. 7055, plaintiff is entitled to an entry of default and default judgment against defendant HFIT.

Finally, Mr. Gibson seems to argue that in this case service on HFIT's beneficiaries is necessary for a default judgment, but he has not cited any law to support his argument. Ordinarily, serving a trustee of a trust is sufficient service on a trust. Mary Ellen West and Susan Thomas, *Georgia Procedure* § 3:152 (2001); *see also* George Gleason Bogert, George Taylor Bogert, and Amy Morris Hess, *Bogert's Trusts and Trustees*, § 593 (Rev. 2d ed. 1977). Mr. Gibson contends that the interests of the trust beneficiaries are not being represented by the remaining trustee Ms. Smith, the beneficiaries' grandmother. Mr. Gibson argues it is possible that in the future that the beneficiaries could have any default judgment set aside because, he alleges, Ms. Smith has breached her fiduciary duties to the beneficiaries. Reciting alleged wrongdoing by Ms. Smith, Mr. Gibson states that a guardian *ad litem* should be appointed for the beneficiaries. While the arguments have been couched in terms of "proper service," perhaps what Mr. Gibson is really arguing is that the beneficiaries are necessary parties to the litigation due to Ms. Smith's alleged breach of fiduciary duties. But Mr. Gibson failed to serve his brief on Ms. Smith's counsel of record or on the beneficiaries' parents, debtors Janet and Charles Hamblen. Procedurally, it would be totally inappropriate for the Court to make any findings with respect to Ms. Smith's alleged wrongdoing or whether the beneficiaries are necessary parties, and the Court denies Mr. Gibson's request for such findings. However, plaintiff can evaluate the facts alleged by Mr. Gibson and determine whether plaintiff wishes to take any additional procedural steps to foreclose future claims by the beneficiaries that may affect plaintiff's ability to enforce the relief sought against HFIT.

Based on the current record and the applicable law, the Court concludes that Ms. Smith was a trustee of defendant HFIT at the time the amended complaint and summons in this adversary proceeding were served, and that service on Ms. Smith as a trustee of HFIT, and on all of the former trustees of HFIT is sufficient service for purposes of the plaintiff's motion for an entry of default and default judgment against HFIT. In accordance with the above reasoning, Mr. Gibson's objection to the entry of default against HFIT is overruled and the default entered by the Clerk against HFIT on January 31, 2007, will not be set aside.

IT IS SO ORDERED, this 9<sup>th</sup> day of May, 2007.

  
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JOYCE BIHARY  
UNITED STATES BANKRUPTCY COURT

**CERTIFICATE OF MAILING**

A copy of the foregoing Order sent by U.S. Mail to the following parties:

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Kathy Harmon  
Judicial Assistant to Judge Bihary

Date: May 10, 2007